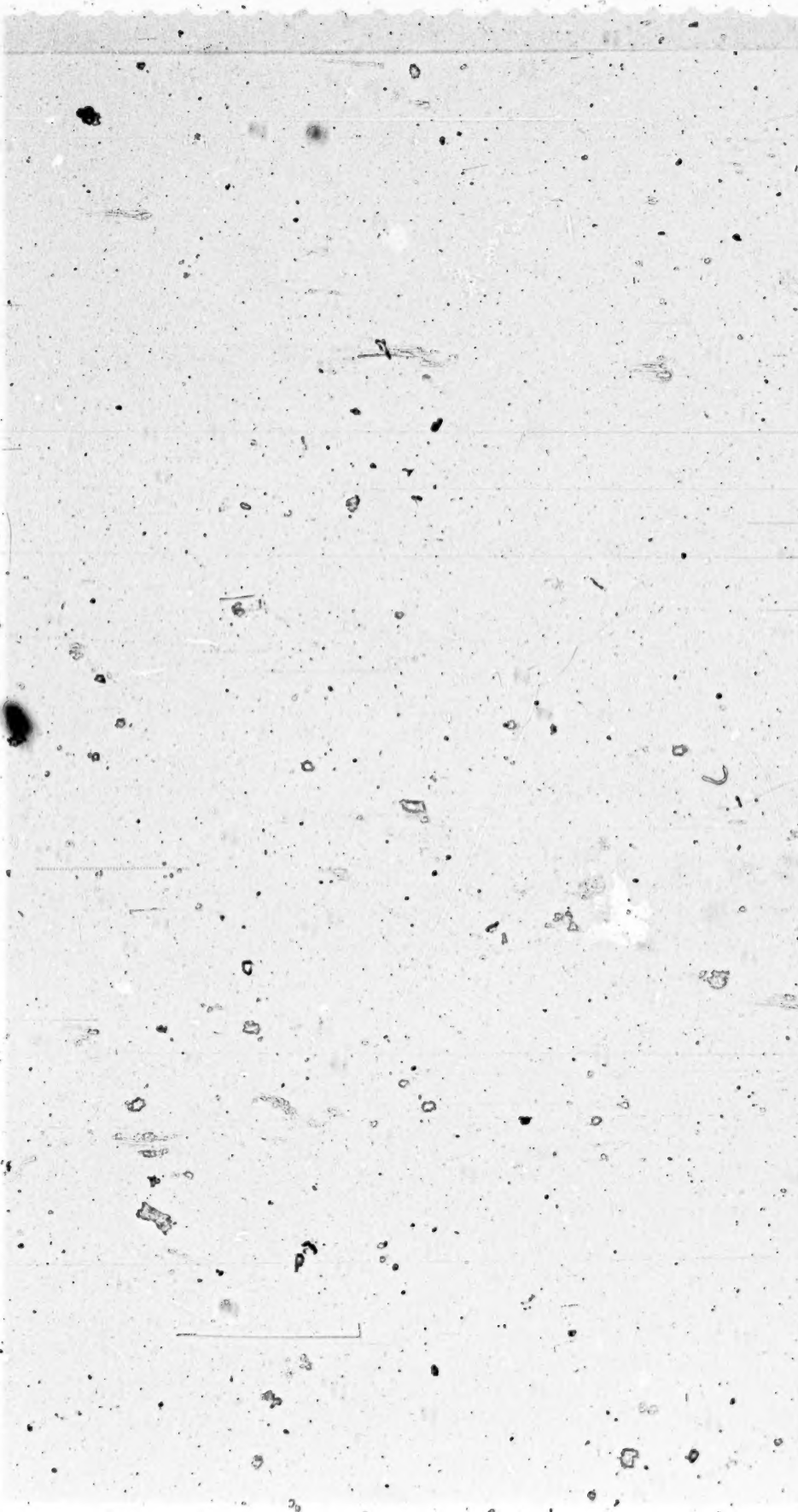

In the Supreme Court

of the United States

No. 280

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION AND INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 16,

Petitioners,

v.

JUNEAU-SPRUCE CORPORATION,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the trial court rendered on demurrers and motions is reported in 83 F. Supp. 224. The opinion of the Court of Appeals is reported in 189 F. 2d 177 (R. 1106).

STATUTE INVOLVED

The only statute involved in this case is Section 303 of the Labor Management Relations Act, 1947, 29 U.S.C. 187, the pertinent portions of which read as follows:

> "Section 303 (a). It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—
>
> * * * * *
>
> "(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. * * *
>
> "(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

QUESTION PRESENTED

The only question presented by the Petition is whether a determination by the National Labor Relations Board under Section 10(k) of the Act is a jurisdictional prerequisite to an action for damages under Section 303(b). The Court of Appeals did not, as intimated in the Petition, rule on whether the same conduct will violate Section 8(b)(4)(D). Neither did it pass on whether a labor organization can be sued for damages for activities directed at compelling an employer to abide by the Board's award.

STATEMENT OF THE CASE

Petitioners' statement of the case contains numerous inaccurate and misleading statements and seems designed to create the impression that the Petitioners were the bargaining representatives for a portion of respondent's employees and that respondent wrongfully took work away from such employees and gave it to members of a rival union. The Court is referred to the opinion of the Court of Appeals for an accurate statement of the facts from which this action arose (R. 1106).

From such opinion it will be noted that respondent at all times material to this action had a contract with Local M-271, International Woodworkers of America, CIO, recognizing that union as the exclusive bargaining agent for all of respondent's employees, except clerical

and supervisory employees, which contract included the disputed work of loading barges; that while members of petitioners were occasionally hired to load vessels or barges of *a customer*, they were never hired to load respondent's barges (R. 1113, 1143). Petitioners, therefore, in demanding the work of loading respondent's barges, were not demanding the restoration of jobs previously performed by them, but were mere interlopers, representing none of respondent's employees, demanding that it agree to take the newly created work of barge-loading from its regular employees and give it to their members. When respondent refused to accede to these demands, petitioners engaged in the unlawful activities outlined in the opinion of the Court of Appeals. Thus, this case involves no question of the right of an employer to favor one group of employees over another. It involves only the right of an employer to assign work to his employees free from interference of outsiders representing none of his employees.

ARGUMENT

1. Throughout the Petition various inaccurate statements are made as to the nature of the Court of Appeals' decision. Consideration of the merits of the Petition will be facilitated by first pointing out what the Court of Appeals *did not* hold.

The Court did not hold, as stated in Specification of Error 2, that conduct which is lawful under Section 8(b)(4)(D) is unlawful under Section 303(a)(4). It

held only that the conduct in question was unlawful under Section 303(a)(4). The Court was not called upon to decide, and it is only Petitioners' conclusion (not supported by statute or decision) that the same conduct was lawful under Section 8(b)(4)(D).

The Court did not hold, as stated on page 17 of Petitioners' brief, that the question of "which employees are entitled to disputed work" was immaterial in an action for damages under Section 303(a)(4). It was not required to pass on such question because, as stated, this was not a contest between two groups of *employees* of respondent.

Neither did the Court hold, as stated on pages 17 and 18 of Petitioners' brief, that a union could be held liable for damages, resulting from a strike to compel assignment of work to its members, even though the Board had previously determined in a Section 10(k) proceeding that employees represented by the striking union were "entitled to the work". The Court had no occasion to so decide because long prior to the Court's decision the Board had held that the members of Petitioners were *not* entitled to the work in question.[1]

What the Court of Appeals did hold was that a Section 10(k) determination by the National Labor Rela-

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[1] *Juneau Spruce Corporation*, 82 NLRB 650. Any intimation that Petitioners were only awaiting the outcome of the 10(k) proceedings and intended to abide by the Board's determination is disproved by the fact that Petitioners' unlawful activities continued for 39 days after the issuance of the Board's determination and the picketing was not discontinued until May 9 shortly before the Regional Director's anticipated application for an injunction, which was issued on May 14, 1949. *Juneau Spruce Corporation*, 90 NLRB No. 233, Note 5. Thus the picketing was in progress during most of the trial, which commenced on April 27, 1949, and terminated on May 13, 1949 (R. 109, 1065).

tions Board was not a jurisdictional prerequisite to an action for damages under Section 303(b) against labor organizations representing none of respondent's employees. In so holding the Court followed the plain language of the statute, which requires no such determination. The Court failed to find anything in the legislative history of the Act to support the Petitioners' contention and, to the contrary, found evidence of a congressional intent to provide means of direct action by employers without awaiting administrative proceedings. Answering Petitioners' argument that this would lead to incongruous results if damages should be recovered and the Board should later hold that members of the striking union were entitled to the work, the Court pointed out that such contingency could not arise because the ones "entitled to the work" were determined by the employer's assignment, not by the Board or the courts. In so holding it referred to a number of decisions of the Board, which has uniformly refused to interfere with the employer's right to assign work.[2]

The Petition herein contesting the correctness of the Court's decision presents no substantial question of federal law. The contentions advanced by Petitioners find no support in the statute, in its legislative history, or in any decisions of any court or the National Labor Relations Board. All of such contentions were fully and carefully considered by the Court of Appeals and

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[2] *Juneau Spruce Corp.*, 82 NLRB 650; *United Brotherhood of Carpenters and Joiners of America, et al.* (Stroh Brewery Co.), 88 NLRB No. 169; *United Brotherhood of Carpenters and Joiners of America, AFL et al.* (New London Mills, Inc.), 91 NLRB No. 86; *Truck Drivers and Chauffeurs Union, etc.* (Direct Transit Lines, Inc.), Case No. 13-CD-13, 92 NLRB No. 257.

found to be without basis. A review of these contentions will show that they are so completely lacking in merit or support as to present no substantial federal question.

The sole basis for Petitioners' contention that an action for damages will lie only for failure to comply with the Board's determination under Section 10(k), is the similarity of language used in Sections 8(b)(4)(D) and 303(a)(4). Petitioners argue that since a labor organization cannot be found guilty of an unfair labor practice under Section 8(b)(4)(D) unless it fails to comply with the Board's order under Section 10(k), it must necessarily follow that it has committed no unlawful act and therefore that it cannot be sued for damages under Section 303(b). But in making such contention, Petitioners ignore the fact that while Congress, by the enactment of Section 10(k), afforded labor organizations a means of escape from unfair labor practice charges under Section 8(b)(4)(D) by voluntary compliance with the Board's determination, it gave no such privilege to escape liability under Section 303 for damages caused by their unlawful acts.

The legislative history not only fails to support Petitioners' claim that a finding by the Board is a jurisdictional prerequisite to a damage action but actually shows to the contrary. Thus, Senator Morse, a member of the senate committee on Labor and Public Welfare, deplored the bill's method of dealing with jurisdictional disputes in the following language:

"I do want to make the additional argument against the Taft substitute, that it makes it possible for *two different district courts* and the *N.L.R.B.* to be dealing *simultaneously* with the same subject matter. The Board would be conducting a hearing looking to a cease-and-desist order. At the same time the Board would be required, to seek injunctive relief, which means that the (sic) would be two actions going on at the same time, or that there might be. * * *

"Finally, under this proposal, we have a third agency—probably a different Federal court—deciding whether a damage action lies. Such dispersion of authority, in my judgment, is very bad legislative policy." (Emphasis supplied) 2 Leg. Hist. 1358.

The President's veto message used the following language in criticising this portion of the Act:

"Moreover, since these cases would be taken directly into the court, they necessarily would be settled by the judiciary before the National Labor Relations Board had a chance to decide the issue. This would thwart the entire purpose of the National Labor Relations Act in establishing the Board, which purpose was to confer on the Board, rather than the courts, the power to decide complex questions of fact in a special field requiring expert knowledge." 1 Leg. Hist. 920.

Notwithstanding this criticism Congress passed the bill over the President's veto.

The provisions for damage actions found in Section 303 were added as a floor amendment to S. 1126 by Senator Taft (2 Leg. Hist. 1346, 1370). An earlier amendment proposed by Senator Ball contained identical provisions but also would have allowed employers to sue

for injunctions (2 Leg. Hist. 1323). The debates in the senate on these amendments indicate clearly that the purpose was to permit direct action in court by the injured party without awaiting action by the National Labor Relations Board, and the questions to be determined in such actions were regarded as purely factual (See statements by Senator Ball, 2 Leg. Hist. 1352-1356, statements by Senator Taft, 2 Leg. Hist. 1371, 1625, and statements by Senator Wherry, 2 Leg. Hist. 1353).

Petitioners attempt to bolster their argument that a Section 10(k) determination is a jurisdictional prerequisite to a damage action by pointing to incongruous results which they say might occur if a Board ruling under Section 10(k) should be contrary to the Court's ruling in a damage action. But as pointed out by the Court of Appeals, whether any of the incongruous results suggested would happen would depend to a large extent on the scope of the Board's determination under Section 10(k); and since the employer's assignment of the work is determinative, there can be no inconsistent rulings by the Board and the courts.

The fault in Petitioners' argument flows from their misconception of the function of the Board in a 10(k) proceeding. They seem to believe that the Board has the power to arbitrate jurisdictional disputes, to ignore the employer's assignment and determine for itself "who is entitled to the work." This conception of the law finds no support in the decisions of the Board or of any court. To the contrary, the Board has repeatedly held that Section 8(b)(4)(D) and Section 10(k) do not de-

prive an employer of the right to assign work to his own employees, or interfere with the employer's freedom to hire, subject only to the requirement against discrimination in Section 8(a)(3). In fact, in *Los Angeles Building and Construction Trades Council, et al.*, 83 NLRB 477, the Board, while finding that certain unions were not entitled to require Westinghouse Electric Corporation to assign work to their members, said:

> "We are not by this action to be regarded as 'assigning' the work in question to the Machinists. Because an affirmative award to either labor organization would be tantamount to allowing that organization to require Westinghouse to employ only its members and therefore to violate Section 8(a)(3) of the Act, we believe we can make no such award. In reaching this conclusion we are aware that the employer in most cases will have resolved, by his own employment policy, the question as to which organization shall be awarded the work. Under the statute as now drawn, however, we see no way in which we can, by Board reliance upon such factors as tradition or custom in the industry, overrule his determination in a situation of this particular character."

It is thus clear that the Board does not consider itself empowered in a 10(k) proceeding to make any affirmative award of disputed work. Any such power would be inconsistent with the protection which the law affords to the employer's assignment of work. Since the latter is determinative, there is no possibility of conflict between Board and court decisions as to "who is entitled to the work."

2. Petitioners are also in error in asserting that the decision of the Court of Appeals conflicts with the principle laid down by this Court in *International Brotherhood of Electrical Workers, etc. v. NLRB*, 341 U.S. 694, 71 S. Ct. 954, 95 L. Ed. 793, that identical language in Sections 8(b)(4)(D) and 303 is entitled to the same meaning. Petitioners seem to assume that because compliance with the Board's 10(k) determination will result in dismissal of an 8(b)(4)(D) charge, it must follow that no unfair labor practice is committed unless and until the union fails to comply with the 10(k) determination. Of course this simply is not true. The identical wording of the two sections means that the same activities are necessary to constitute the unlawful acts, but it does not mean that Congress could not provide for condonement of the unfair labor practice charge while preserving the right to damages.

Section 8(b)(4)(D) is the substantive provision which determines what constitutes the unfair labor practice. Section 10 contains the enforcement provisions and relates to nothing but procedure. Under Section 10(k) the Board is authorized when an 8(b)(4)(D) charge is filed, to "hear and determine the dispute out of which such unfair labor practice shall have arisen", unless a voluntary settlement is made in 10 days. If, after a 10(k) determination there is compliance with the determination, the unfair labor practice charge is dismissed.

Construing Sections 10(k) and 8(b)(4)(D) together, the Board holds that it must first hold a 10(k) hearing

and afford the parties an opportunity to comply with its determination before it can issue a complaint for violation of 8(b)(4)(D) under Section 10(b).[3] This fact, and the fact that the unfair labor practice charge is dismissed if there is compliance with the 10(k) determination does not mean that there never was a violation of 8(b)(4)(D). It merely means that Congress has provided a means for condonement of the offense, comparable to the dismissal of an indictment because the public interest does not require prosecution; or the refusal of an injunction because the wrongful acts have been discontinued. It does not mean that the unlawful acts described in 8(b)(4)(D) were not nevertheless committed.

It is thus clear that commission of the acts in question constituted here a violation of both Sections 8(b)(4)(D) and 303(a)(4). Petitioners could evade responsibility for commission of the unfair labor practice by complying with the Board's 10(k) determination, but Congress did not provide any comparable method of evading responsibility for the damages caused by their unlawful acts. Accordingly, the Court of Appeals has not given to the language in Section 303 a meaning different from that in Section 8(b)(4)(D).

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[3] *Moore Drydock Co.*, 81 NLRB 1108; *Juneau Spruce Corp.*, 82 NLRB 650.

CONCLUSION

Petitioners have failed to advance any substantial basis for their distorted construction of the statute. Their arguments are based primarily upon vague predictions of difficulties which might be encountered in hypothetical cases if the National Labor Relations Board and the Courts should reach contrary conclusions as to the ones entitled to disputed work. No such conflicts have yet arisen, nor can they arise in the future, for the reasons given by the Court of Appeals. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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